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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/596,034	01/31/2007	David Bassin	3869/029 US	1908
23440 7590 03/02/2011 GOTTLIEB RACKMAN & REISMAN PC 270 MADISON AVENUE 8TH FLOOR NEW YORK, NY 10016-0601				
EXAMINER				
LOUIS, LATOYA M				
ART UNIT		PAPER NUMBER		
3771				
MAIL DATE		DELIVERY MODE		
03/02/2011		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action
Before the Filing of an Appeal Brief

Application No.

10/596,034

Applicant(s)

BASSIN, DAVID

Examiner

LaToya M. Louis

Art Unit

3771

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 15 February 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☒ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____

Claim(s) objected to: _____

Claim(s) rejected: 112-134

Claim(s) withdrawn from consideration: _____

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771

/LaToya M Louis/
Examiner, Art Unit 3771
2/25/2011

Continuation of 3. NOTE: The limitation of relatively short and relatively long ventilation measures raises new issues which would require further consideration and/or search. In addition the limitation of short and long ventilation measures is not supported by the original specification as filed..

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments filed 2/15/2011 have been fully considered but they are not persuasive.

Regarding applicant's arguments on page 9 3rd paragraph, applicant argues that "in at least one embodiment in the specification of the present invention, the different measures are different in that they are taken over different time intervals." Examiner respectfully disagrees because the limitations of two different measures being taken over different periods of time is not found in the disclosure as originally filed. On pages 15 and 16 of the specification, it is disclosed that the two measures are different in that one is low pass filtered to cause a delay. The Examiner can find no other embodiment referring to two different ventilation measures. Thus applicant's amendments and arguments are not supported by the disclosure.

Regarding applicant's arguments on page 10, 2nd paragraph, applicant argues that in Berthon-Jones, there is "only one measure, f , not two measures (1) as indicated in the Office Action or (2) as required by limitation 2 of the claims. Further, there is no discussion even suggesting two measures of f -it is only described as a single measure." Examiner respectfully disagrees because f is a variable and thus represents multiple airflow values, each value of f detected by the airflow sensor as ventilation measure (page 4 lines 8-10). Thus Berthon-Jones discloses in [0034] a measured value of f that is grossly under target as first ventilation measure which causes a fast speed of response and a measured value of f that is over or slightly below target as second ventilation measure which causes a slow speed of response. Thus Berthon-Jones reads on the limitations as claimed.

Regarding applicant's arguments on page 11 first full paragraph, applicant argues that "In addition, the Examiner indicates that the "error values can have a positive or negative sign" and appears to equate this difference in sign to "multiple error values" which are used to control the ventilator. However, the parameter is of a single value regardless of sign." Examiner respectfully disagrees because Berthon-Jones discloses a formula for calculation of error values (page 6 lines 30 and 45). This error calculation formula depends on the variable f . Since the values for the airflow inherently change as the patient breathes, the value of the error calculation will also change resulting in several different error values depending on the values of the changing airflow. Berthon-Jones discloses on page 6 lines 45-48 that if the value of the error calculation formula $0.5|f - V_{tgt}$ results in a positive value (second error) because airflow is greater than target, then the subject requires less ventilatory support, and conversely if it results in a negative value (first error) because airflow is less than target, then the subject requires more ventilatory support. Thus there are at least two error values which are calculated by the error calculation formula.

Regarding applicant's arguments on page 12, 2nd paragraph, applicant argues that "As a start, the "two" responses as identified by the Examiner are actually the same response, Π (Φ). There is no reference to any second response." Examiner respectfully disagrees because Berthon-Jones discloses in [0034] that the controller responds the error values in two different ways as two different control responses. The first way/response is to decrease the smoothness of the wave for a negative error calculation value and the second way/response is to increase the smoothness of the wave for a positive error calculation value. Thus there are two different responses implemented by the controller.